SERVED: August 27, 1992

NTSB Order No. EA-3653

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of August, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. ROBERT HALLAHAN, Respondent.	Docket SE-10614

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William A. Pope, rendered at the conclusion of an evidentiary hearing on May 16, 1990.[1] The law judge affirmed an order of the Administrator charging respondent with violations of sections 91.88(c), and 91.9 of the Federal

[1]An excerpt from the hearing transcript containing the initial decision is attached.

Aviation Regulations ("FAR," 14 C.F.R. Part 91),[2] for his alleged flight into controlled airspace without establishing two-way radio contact, but found that the Administrator did not prove by a preponderance of the substantial, reliable, and probative evidence that respondent acted contrary to an air traffic control (ATC) instruction, as prohibited by FAR section 91.75(b).[3] The Administrator did not appeal the decision.

After consideration of the briefs of the parties and the entire record, the Board concludes that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as modified by the law judge. We adopt the factual findings of the law judge as our own.

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[2]FAR sections 91.88(c) and 91.9 (now recodified at sections 91.130(c) and 91.13, respectively) read in pertinent part at the time of the incident:

"§ 91.88 Airport radar service areas.

(c) Arrivals and overflights. No person may operate an aircraft in an airport radar service area unless two-way radio communication is established with ATC prior to entering that area and is thereafter maintained with ATC while within that area."

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

[3]The Administrator also alleged in the complaint that respondent violated FAR section 61.3(c). The charge was dismissed at the hearing.

Section 91.75(b) (now recodified at 91.123(b)) stated:

"§ 91.75 Compliance with ATC clearances and instructions.

(b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircraft contrary to an ATC instruction."

Briefly stated, the facts are as follows: The Administrator alleged in the complaint that, on August 3, 1988, respondent acted as pilot-in-command of N12679, a Cessna 172 aircraft, on a passenger-carrying flight in the vicinity of Syracuse, New York.[4] When respondent entered the Syracuse Airport Radar Service Area (ARSA), he complied with the instruction to climb to 2,500 feet and proceed to the northeast practice area. He asked to be cleared to 5,000 feet over the city, but air traffic control (ATC) denied his request, explaining that there was too much traffic over the city. The controller told respondent that first he must reach the practice area, and then "I'll climb you and then you can plan to go over the city."[5]

Although respondent acknowledged the transmission, soon after, ATC noticed the aircraft climbing to 2,800 feet. As there was jet traffic at 3,000 feet, the controller had to redirect the jet in order to avoid a conflict. Respondent then acknowledged and complied with the next instruction to descend to 2,500 feet. He requested clearance to 5,000 but his request was again denied. Now outside the ARSA, respondent decided to switch to visual flight rules (VFR) and confirmed to ATC that he would "squawk 1200." The controller responded "good day" and terminated radar services.

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[4]Respondent was carrying representatives from a local radio station on a test run in anticipation of a future promotion where a radio show would be broadcast from an airplane above the city.

[5]Respondent testified that he only heard the controller say "climb" and "you" and therefore thought he had been cleared to climb.

The Administrator alleged that after climbing, respondent returned to an area above the 4,400-foot ceiling of the ARSA. The controller then observed on her radar screen respondent descend to 4,100 feet. Respondent maintains that he never descended below 4,500 feet and never reentered the ARSA. At the hearing, he claimed that the transponder malfunctioned, giving ATC an incorrect altitude reading for his aircraft. He attempted to prove his theory by producing evidence that, in December 1988, the transponder on that aircraft was found to be emitting an erroneous signal. The law judge decided that this evidence was too remote to prove that the equipment malfunctioned in August 1988. We agree with the law judge's assessment.

The Administrator admits, and it is clear from the record, that the law judge improperly characterized the ARSA ceiling as 4,500 feet when it was actually 4,400 feet. Respondent argues that since the law judge erroneously found the boundary of the Syracuse ARSA to be 4,500 feet in the area where respondent was tracked at 4,100 feet, the initial decision was not based on a preponderance of the reliable, substantial evidence. He asserts that it is quite likely the law judge may have reached a different conclusion had he been aware of the correct facts. We do not accept this argument and have determined that the law judge's error was harmless. Regardless of this error, respondent still made an unauthorized 300-foot incursion into controlled airspace. There is nothing in the record to indicate that the law judge thought a 400-foot incursion was deserving of a

sanction, but a 300-foot incursion was not.

Regarding respondent's claim that the transponder and encoder malfunctioned during the flight, the law judge correctly determined that the evidence produced to support the argument was insubstantial. The Administrator does not have to prove that all the equipment on respondent's aircraft and in the control facility was working properly. Cf. Administrator v. Hodges, NTSB Order No. EA-3546 (1992) (The Administrator has no affirmative duty to prove that radar equipment was not faulty). Nonetheless, the controller testified that she believed the altitude readings she saw were correct because she observed respondent level off at 2,500 feet after he was instructed to do so.

Respondent also argues that because the FAA did not preserve the original data obtained by ATC from the transponder signal and later printed out, he therefore was deprived of a fair hearing. He claims that without this information it was impossible for him to refute the controller's testimony and, in the interest of justice, her testimony should be disregarded. Again, we do not accept respondent's argument. The law judge excluded from evidence a graph created from this evidence; therefore, the data was not utilized by the Administrator to prove the charges against respondent. The Administrator presented an adequate prima facie case through the testimony of the controller who communicated with respondent and who utilized radar to monitor the aircraft's position and altitude. The law judge found the testimony of the controller credible and we see no basis to

disturb his decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's order, as modified by the initial decision, is affirmed; and

3. The 15-day suspension of respondent's airman certificate shall begin 30 days after service of this order.[6]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[6]For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).